

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Government,

HONORABLE GEORGE CARAM STEEH

v.

No. 15-20652

D-3 EUGENE FISHER,
D-4 COREY BAILEY,
D-6 ROBERT BROWN,
D-10 DEVON PATTERSON,
D-13 ARLANDIS SHY,
D-19 KEITHON PORTER,

Defendants.

MOTION HEARING

Monday, June 18, 2018

- - -

APPEARANCES:

For the Government:

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MARGARET SMITH, ESQ.
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On behalf of Eugene Fisher

CRAIG DALY, ESQ.
KEITH SPIELFOGEL, ESQ.
On behalf of Corey Bailey

JAMES FEINBERG, ESQ.
On behalf of Robert Brown

BERTRAM JOHNSON, ESQ.
On behalf of Devon Patterson

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MARK MAGIDSON, ESQ.
JOHN THEIS, ESQ.
On behalf of Arlandis Shy

STEVEN SCHARG, ESQ.
On behalf of Keithon Porter

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Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1067
Detroit, Michigan 48226
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N O N E

Detroit, Michigan

Monday, June 18, 2018

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THE CLERK: Case Number 15-20652 United States versus Billy Arnold et al.

THE COURT: Good morning. Okay. So we had a couple of developments that needs to be addressed, and how would you like to proceed?

MR. H. SCHARG: Should we put appearances on the record?

THE COURT: Yes.

MR. H. SCHARG: Henry Scharg on behalf of Eugene Fisher. Well, women first.

MS. SMITH: Thank you, your Honor. Good morning. Maggie Smith, Julie Finocchiaro, Billy Sloan and Mark Bilkovic for the United States.

THE COURT: Good morning.

MR. H. SCHARG: Government first, right?

MS. SMITH: Either way.

MR. H. SCHARG: Henry Scharg on behalf of Eugene Fisher.

MR. JOHNSON: Good morning, your Honor. If it please the Court, Bertram Johnson on behalf of Devon Patterson.

1 **THE COURT:** Good morning.

2 **MR. DALY:** Good morning. Craig Daly on
3 behalf of Corey Bailey.

4 **THE COURT:** Welcome.

5 **MR. SPIELFOGEL:** Also Keith Spielfogel for
6 Mr. Bailey.

7 **THE COURT:** Welcome.

8 **MR. FEINBERG:** James L. Feinberg, attorney
9 for Robert Brown, II.

10 **THE COURT:** Good morning.

11 **MR. THEIS:** Good morning, your Honor. John
12 Theis, one of the attorneys for Arlandis Shy.

13 **MR. MAGIDSON:** Good morning, your Honor.
14 Mark Magidson on behalf of Arlandis Shy.

15 **MR. S. SCHARG:** Good morning. Steven Scharg
16 on behalf of Mr. Porter.

17 **THE COURT:** Welcome.

18 **MR. H. SCHARG:** Can I say something before we
19 start?

20 **THE COURT:** Yes.

21 **MR. H. SCHARG:** Thank you. We had a pretrial
22 last week, pretrial motions, and I made a motion for
23 severance, and I have -- I respect the Court's ruling, but
24 what's been festering me all week was that the Court made
25 a reference to an in camera or in chambers discussion that

1 we had --

2 **THE COURT:** Right.

3 **MR. H. SCHARG:** -- where the Court said that
4 Mr. Scharg was given the opportunity to ask for a
5 severance, and that I denied or rejected that, and it kind
6 of put us in opposition in terms of your recollection of
7 the meeting the conference and what I told the Court, and
8 inferred that maybe I was misleading the Court or I was
9 dishonest with the Court, but I just want to clarify one
10 thing.

11 It wasn't me that was directed to. It was Mr.
12 Feinberg who was asked whether he wanted a severance,
13 because if the Court remembers, Mr. Feinberg's learned
14 counsel had to step down because of health reasons, and
15 the Court asked Mr. Feinberg whether Mr. Feinberg wanted
16 want a severance. Never, ever did I tell the Court that I
17 didn't want one.

18 I don't think it has any impact and it didn't have
19 an impact on the Court's decision, but it had an impact on
20 my credibility with this Court, and I just wanted to
21 clarify that because it didn't happen that way the Court
22 recollected. Obviously, it has no impact on the Court's
23 decision to deny my motion, but I didn't want the Court to
24 believe in any way that I would at any point in time say
25 something to the Court to mislead the Court or be not

1 true.

2 **THE COURT:** I never thought you did. So I
3 accept your version, in fact, of the conversation, and
4 it's quite possible that I was thinking you when I
5 addressed a question to Mr. Feinberg.

6 **MR. H. SCHARG:** I understand how you can get
7 Mr. Feinberg and I confused. We definitely look alike.

8 **THE COURT:** I think the major point was that
9 I was inviting people to ask if they were interested in
10 severance, and the only one that I heard from was Mr.
11 Swor.

12 **MR. H. SCHARG:** And again, my recollection at
13 that point in time, I also did not directly demand, but I
14 have made my position known, but the issue was whether I
15 specifically said I didn't want a severance, and that was
16 Mr. Feinberg and not myself.

17 **THE COURT:** Right. Thank you.

18 **MR. JOHNSON:** Judge, if I may quickly with
19 respect to that status conference?

20 For the record I would like to indicate that this
21 Court did ask a number of us. You, in fact, asked me, and
22 I responded in the waiver of my client being present in
23 the status conference, and me moving forward with that
24 answer I said no, I could not accept it, and I just want
25 to make that for the record. Even if I felt that

1 severance might have been a reasonable position to take
2 legally, my client informed me that he would not want to
3 put that trial date back.

4 Again, I want to also address the renewal of
5 myself severance motions with the motions that have come
6 into being over the last few days, motion in limine.

7 Again, for the record, I may believe that my
8 client should be severed from this group for reasons
9 stated that you will hear, but again, for the record,
10 since we're talking about severance, I want to make it
11 clear that my client, again, has instructed me under no
12 reason -- under no certain terms that does he want to have
13 his date moved.

14 **THE COURT:** Okay. Thank you, Mr. Johnson.

15 All right. So which of the new issues do we wish
16 to address first, and who's going to --

17 **MS. SMITH:** Well, your Honor, I believe they
18 are defense motions. So as I understand it, what's up
19 today has to do with the motion regarding the lineup. I
20 think it's Robert Brown's motion, Number 1061, and then
21 the other motion is Number 1063, which is defendant Shy's
22 motion in limine to preclude Corey Bailey's video recorded
23 statements. So whatever one the Court wants to hear
24 first, it is the defense motion.

25 **THE COURT:** Why don't we do the lineup

1 question first. Who will be addressing that? Mr.
2 Feinberg?

3 **MR. FEINBERG:** Good morning, your Honor.

4 **THE COURT:** Good morning.

5 **MR. FEINBERG:** Last week I received a
6 notification, a telephonic notification that a new witness
7 against Mr. Brown was going to be offered. The following
8 day I received a report that is attached to the
9 government's response. I then filed the motion to
10 suppress the photographic lineup identification by Jesse
11 Gaskin, or in the alternative conduct an evidentiary
12 hearing. I submitted the motion in brief, cited facts and
13 law, but what I want to highlight is the various court's
14 rulings as to identification and photo.

15 In 2006, Mr. Gaskin's name was in a police report
16 taken at the time of the shooting. His name has been in
17 the report for 12 years.

18 On the 13th of June of this year is when the
19 investigators in this case decided to reinterview some of
20 the names that were in the report. One witness was
21 interviewed in May. Mr. Gaskin was interviewed in June.
22 Mr. Brown was in custody. The government wanted to show a
23 photographic array to Mr. Brown.

24 First and foremost, because Mr. Brown was in
25 custody and he had counsel, the proper procedure would

1 have been to have a live lineup with his attorney present.
2 That was not done. That was the choice of the government.
3 The government chose to interview Mr. Gaskin and show him
4 six photos.

5 Now Mr. Gaskin 12 years prior, again, was not
6 interviewed, and gave no identification because he was not
7 questioned. We don't know from the report --

8 **THE COURT:** So how do we know from that --
9 from that report is that he was present --

10 **MR. FEINBERG:** Correct.

11 **THE COURT:** -- at the time of the incident?

12 **MR. FEINBERG:** Correct.

13 **THE COURT:** No details were elicited at that
14 time?

15 **MR. FEINBERG:** None. So last week the
16 identification that Mr. Gaskin gave of the shooter was --
17 that the deacease was dark skin, black man, and that the
18 shooter was a lighter skin black man, clean cut, gave some
19 kind of description of the clothing.

20 **THE COURT:** Specific description, right? I
21 mean, white T-shirt, black pants or --

22 **MR. DALY:** Right, but he indicated in the
23 report that he was not 100 percent sure of the clothing
24 because of the amount of time that went by.

25 The proper procedure of a photographic array is to

1 have a blind photo array. That means the people
2 presenting the array did not know who the suspect was, and
3 this is for obvious reasons, because the Court has ruled
4 that it's possible to inadvertence that the agents who
5 knew who the defendant was and who was the target, could
6 have indicated some kind of idea to the witness who the
7 person was that they were targeting. That's why the blind
8 array is done. Blind, meaning that the person or persons
9 who are presenting the photo array have no idea who the
10 suspect is.

11 Further, even though it was done sequentially,
12 meaning that it wasn't all six photos in one piece of
13 paper, each photo was shown separately, but the proper
14 procedure is not to have one photo array, but to have
15 multiple photo arrays where the first group, second group,
16 third group all have different photos, and that the
17 suspect is not in two of the three, but is in only one.
18 That was not done in this particular case.

19 Also, because of modern technology, witnesses are
20 often, if not preferred, to be videoed interview, so that
21 we know -- and also the photo array is videoed -- we know
22 whether or not there is any impropriety either
23 intentionally or unintentional.

24 We don't know whether or not that was done because
25 the government who has vast technology at their fingertips

1 chose not to videotape the interview and photo array. We
2 know that in 2014 they had video technology because the
3 next motion involves an interview of one of the defendants
4 that was videoed for almost four hours. That's the proper
5 way to interview witnesses.

6 One of the items that the courts look upon is the
7 confidence level of the identification.

8 **THE COURT:** Right.

9 **MR. FEINBERG:** Also the time period. We know
10 the time period was 12 years. The confidence level in
11 this particular case is supposedly, we don't know exactly
12 the wording, but that Mr. Gaskin, upon looking at the
13 photos, saw Mr. Brown's photo and said that's him. Later
14 his confidence level was --

15 **THE COURT:** Favors.

16 **MR. FEINBERG:** -- favors him.

17 **THE COURT:** Right.

18 **MR. FEINBERG:** Then he says it's been a long
19 time, and he wanted to be sure it was the right guy, and
20 he says it favors. That's not a confidence level of a
21 positive identification.

22 **THE COURT:** Right.

23 **MR. FEINBERG:** The government says that can
24 be gone into on cross examination. We argue that it
25 shouldn't even go that far, that Mr. Gaskin's testimony is

1 potentially so unreliable. The government violated many
2 areas of the law in conducting the interview and the photo
3 array, that under no circumstances should Mr. Gaskin's
4 testimony be allowed.

5 In the alternative, we need to have an evidentiary
6 hearing, not necessarily as to whether or not Mr. Gaskin
7 is 100 percent positive in the identification, but an
8 evidentiary hearing as to the entire conduct of the lack
9 of Mr. Gaskin being interviewed 12 years ago, how it was
10 that he was interviewed on the 13th after the trial had
11 already started by picking a jury, three days before
12 testimony was to suppose to be taken, and whether or not
13 this Court is going to consider, based on the evidentiary
14 hearing, if the Court needs it to exclude Mr. Gaskin's
15 testimony. The evidentiary hearing would require all of
16 the agents who participated in the interview, as well as
17 Mr. Gaskin.

18 So first we ask the Court to, based on the motion
19 and the law that the Court has that's been provided by the
20 government and the defense, and the report of Mr. Gaskin's
21 interview, to suppress Mr. Gaskin's testimony, and to
22 exclude him from testifying.

23 **THE COURT:** Thank you, Mr. Feinberg.

24 For the government?

25 **MR. SLOAN:** Good morning, your Honor.

1 William Sloan on behalf of the United States.

2 **THE COURT:** Good morning, Mr. Sloan.

3 **MR. SLOAN:** Your Honor, I would just like to
4 begin by handing up a color photo of the lineup which was
5 referred to in the government's response brief.

6 **THE COURT:** Okay.

7 **MR. SLOAN:** And your Honor, Mr. Feinberg does
8 have a copy of that.

9 **MR. FEINBERG:** I received it this morning,
10 your Honor.

11 **THE COURT:** As I understand it, Photos 4 and
12 5 were not shown because the witness identified the person
13 depicted Number 3, is that right?

14 **MR. SLOAN:** That's actually incorrect, your
15 Honor, and I think it is an important factual point. The
16 way this photo array played out was that -- in keeping
17 with current best practice -- the agents showed what's
18 referred to a six pack photo array, six photos, one of
19 which was of the defendant, five were filler photographs
20 of individuals of similar ethnicity and age and
21 appearance.

22 The way the agents did this was they presented for
23 each photo, they instructed the witness to look at each
24 photo, and tell us if you recognize this person. That's
25 it. The witness did not Photo Number 1, not Number 2.

1 When Number 3 came up, which was Mr. Brown, the witness
2 said that's him. The agents then asked a few follow up
3 questions as to how do you recognize that person.

4 Once that happened, the agents proceeded with
5 showing 4, 5 and 6, which is an important factor to show
6 that the agents were not emphasizing Photo 3, or indeed,
7 giving any feedback to the witness that he may or may not
8 picked out who the suspect was, and it is standard
9 procedure in these arrays to go through all the photos,
10 and give no feedback as whether that was the right person
11 or not so to speak.

12 Your Honor, if I may start out with a couple of
13 highlight points.

14 The defendant's motion cites two basis for
15 supression, one just to get out of the way, Sixth
16 Amendment right to counsel. The case law is clear.
17 Whatever state practice may be, federal law is very clear
18 that while there may be a Sixth Amendment right to counsel
19 for an in person show up by the defendant or lineup, there
20 is no such similar Sixth Amendment right to counsel
21 present for a photo array, and the government referred to
22 that at the end of its brief, but I just want to point the
23 Court to the case we did not cite, which is clearly on
24 point, the Supreme Court case, United States versus Ash,
25 413 U.S. 300, which holds that in an opposed indictment,

1 photographic display, there is no Sixth Amendment right to
2 counsel present.

3 So turning to the heart of the defendant's motion,
4 which is the due process claim, as we stated in our brief,
5 your Honor, the government doesn't think we get past step
6 one here, which is that the defendant has to make an
7 initial showing, carry an initial burdensome that there
8 was some improper law enforcement conduct that was
9 impermissibly suggestive to the witness, and only then
10 does the Court need to do a further inquiry into the
11 specific facts to see if the identification was
12 nevertheless reliable.

13 And as we set forth in our brief describing the
14 procedure, the agents used almost to a "T", photo array
15 practices here, and the defense simply pointed to nothing
16 that would suggest impermissible suggestiveness by the
17 agents.

18 The only thing that Mr. Feinberg raised is the
19 fact that the agents were not, quote-unquote, blind
20 administrators, and while I think Mr. Feinberg referred to
21 what he quoted, said were what the law requires, what I
22 think he actually was referring to was what a DOJ guidance
23 manual suggests would be idea circumstances for preferred
24 procedures. And that manual itself on the one hand does
25 suggest a blind procedure as preferable, it expressly

1 acknowledges that that's not always possible given
2 practical realities, time constraints, people constraints,
3 and I think that's what happened here, your Honor.

4 This witness was identified to be reinterviewed.
5 The agents involved in the trial are doing a lot of
6 witness prep and trial prep. They went to talk to this
7 agent (sic). They brought a photo array with them in case
8 the interview was successful, and if he remembered
9 anything. Based on their initial start of the interview
10 that he did recall this incident, they then proceeded to
11 show him a photo array in line with customary FBI
12 practice.

13 So this simply was not a case of the government
14 intentionally avoiding doing a lineup or involving
15 counsel. It was a practical exigency of interviewing this
16 witness this trial and the run up to trial.

17 So, your Honor, I think based on how this
18 procedure was done and the report the government attached,
19 as well as photos themselves, there's nothing the defense
20 can point to in case law that suggests anything about this
21 procedure was impermissible or suggestive to get to the
22 factor analysis under *Neil v Biggers*.

23 So the government would suggest that no
24 evidentiary hearing is necessary here, and in fact,
25 defense counsel can use cross examination at trial for

1 this witness, or request certain jury instructions to
2 answer his concerns.

3 **THE COURT:** All right. Thank you, Mr. Sloan.
4 Mr. Feinberg?

5 **MR. FEINBERG:** May I address it from here?

6 **THE COURT:** No, I think you're better off at
7 the podium.

8 **MR. FEINBERG:** It's interesting the
9 government would say that the DOJ preference of having a
10 blind array wasn't done because it wasn't -- it was not
11 always possible. Time constraints.

12 Well, all they have to do was one day later. I
13 mean, we're not talking about it was an emergency. All
14 they have to do is bring in agents who had nothing do with
15 the case to conduct the photo array. That's totally
16 disingenuous on the government's part. They caused the
17 time constraint that they're arguing that they are under.
18 Not the defense.

19 Further, what were the circumstances that
20 prevented the government from conducting a blind array?
21 They indicated no circumstances that caused them not to be
22 able to comply with the DOJ preference of conducting a
23 blind array.

24 Lastly, they never even addressed the fact that it
25 wasn't done video. Video lineups are done all the time.

1 Video interviews are done all the time. They had the
2 equipment present like they have every minute of every
3 day. It is totally disingenuous to say that they did what
4 they did because of the delay of their own investigation.
5 We would argue that absolutely it should be suppressed, or
6 in the alternative conduct a thorough evidentiary hearing.

7 **THE COURT:** So how do you respond to the
8 government's argument that the Court never reaches the
9 Biggers factors if a wrongdoing is not first established?

10 **MR. FEINBERG:** The case law that I cited,
11 your Honor, indicates that there is a suspicion of
12 impropriety if it's not done properly. Case law indicates
13 that there is a likelihood of impropriety if it's not done
14 the proper way.

15 It wasn't done the proper way. Therefore, there
16 is a possibility of impropriety which has to go in favor
17 of the defense since the defense did not cause the
18 impropriety.

19 Also, under the trilogy, the Wade, Gilbert,
20 Stovall back in the late 60's, indicates that where the
21 defendant is available, a live show up should be
22 conducted. Not just state, but those were United States
23 Supreme Court cases, which is, I guess, the prosecution
24 doesn't go that far back into the late 60's to see what
25 the language of the Wade case.

1 They didn't also respond as far as why it wasn't
2 videotaped, and why they didn't have multiple arrays which
3 is always the preference.

4 **THE COURT:** All right. Mr. Sloan?

5 **MR. SLOAN:** Your Honor, just briefly --

6 **THE COURT:** Tell me about, again, the
7 threshold finding that you believe needs to occur before
8 the Biggers factors are considered.

9 **MR. SLOAN:** The defense has to make some
10 showing that there was impermissible suggestiveness by law
11 enforcement agents, and the defense's only argument is
12 that this procedure was not done under perfect ideal world
13 scenarios laid out in the DOJ guidance manual, but that's
14 not what the law says.

15 The government laid out in its brief, the examples
16 and case law precedent that show where examples of
17 impermissible suggestiveness are much more dramatic than
18 anything that occurred here.

19 For example, in a photo array making the
20 defendant's or suspect's photograph the only color
21 photograph, and all of the others are black and white
22 calls out that photograph.

23 For instance, agents telling the witness in
24 advance the suspect is in this array, or conversely, when
25 a witness picks out a photo confirming or giving feedback

1 to that witness that that's the right person.

2 Those are examples of impermissible suggestiveness
3 on behalf of agents, but in the defendant's motion, he's
4 alleged no facts whatsoever of impermissible
5 suggestiveness. All he's alleged is that in a perfect
6 world this could have been videoed and have blind
7 administrators, but that's not what the law requires.

8 **THE COURT:** So you agree that the
9 identification here was -- let's assume for the moment
10 that we're going to address the totality of the
11 circumstances analysis, and the factors include his level
12 of certainty. Mr. Feinberg points out that while he
13 declared his certainty initially, his last references were
14 to -- the photograph favors, and when asked to explain
15 what that means, he said looks like the person I saw.

16 **MR. SLOAN:** Yes, your Honor. So one point
17 that the government made in its brief, his initial
18 recognition of the photograph seems to indicate greater
19 certainty, and he certainly hedged afterwards, and there's
20 some indication case law and social science research that
21 indicates that the initial reaction should carry great
22 weight. I believe the *Manson v Brathwaite*, Supreme Court
23 case, refers to that, and that fall under the -- let me
24 turn to the other factors just briefly, your Honor.

25 I think the first two factors in terms of the

1 witness' opportunity to view the suspect back in 2006 and
2 his degree of attention both weigh in favor of reliability
3 here. The witness' explanation was he was taken a lunch
4 break in the vicinity of where --

5 **MR. FEINBERG:** Objection. We don't know.
6 That's not in the report.

7 **MR. SLOAN:** Your Honor, that is in --

8 **MR. FEINBERG:** The report never -- the
9 witness was never asked how long you had to look. Were
10 you doing anything else in the meantime? That's why,
11 number one, it should be excluded, or an evidentiary
12 hearing. The prosecutor can't indicate what the person
13 said that was not recorded, and what you and I don't have.

14 **THE COURT:** All right. It would assist the
15 Court to have some proffer as Mr. Sloan was beginning --

16 **MR. FEINBERG:** The prosecutor was not
17 present. How can he make a proffer?

18 **THE COURT:** I recognize that.

19 **MR. FEINBERG:** He didn't talk to the witness.

20 **THE COURT:** This is -- this maybe pertinent
21 to the Court's decision about whether to have a
22 evidentiary hearing or not. I'm not going to be relying
23 on representations that are not in the record somewhere.
24 Go ahead.

25 **MR. SLOAN:** Your Honor, so I think what's

1 captured in the report, which is what I'll limit the
2 proffer to -- and that again is attached to the
3 government's response brief -- is that this witness was on
4 a lunch break in the vicinity of where the initial fight
5 broke out between Defendant Brown and the victim, and from
6 the report it indicates the witness observed not only the
7 initial fight, from which he describes Mr. Brown's
8 appearance relative to the other person that he was
9 fighting, the ultimate victim, he then describes the
10 suspect leaving the area. The witness was still there
11 minutes later when Mr. Brown came back with a rifle. The
12 witness observed him go into an apartment complex, heard
13 shots, and witness was still there when Mr. Brown exited
14 the apartment complex and fled the area.

15 So while it's true the report doesn't indicate a
16 specific time amount, what is clear from the report is
17 that the witness had at least a several minute period to
18 view the suspect on several different occasions.

19 In terms of the second factor, the attention,
20 certainly observing a fight, and then watching somebody
21 come back with rifle and hearing shots is a dramatic event
22 that would draw someone's attention to these facts.

23 Mr. Feinberg's motion seems to indicate that the
24 observer had to be some type of trained observer. That's
25 simply not the case, otherwise we couldn't have any

1 eyewitnesses who weren't police officers. So I think
2 those two factors cut in favor of reliability.

3 Certainly the government can see there was quite a
4 time lapse between the 2006 shooting and the 12 year later
5 identification. So we would not contest the fact that
6 that factor probably cuts against reliability.

7 In terms of --

8 **THE COURT:** May I ask, if again, there is a
9 hearing to take place, do you have a description from --
10 there's a second witness who's been known for sometime,
11 apparently, and that person was interviewed. Is there any
12 similarity or dissimilarity between the physical
13 descriptions of those two witnesses?

14 **MR. SLOAN:** With the Court's indulgence?

15 **THE COURT:** Sure. Mr. Sloan?

16 **MR. SLOAN:** I don't want to risk misspeaking.
17 I don't recall exactly if the specific physical
18 description of the suspect has similarities with the other
19 witness. However, what I can proffer to the Court is that
20 the other witness' general description of the sequence of
21 events in terms of the fight, the return with the rifle,
22 and suspect fleeing align with this witness' account.

23 **THE COURT:** Okay. You agree that the
24 Court -- again, if we're addressing these factors, if the
25 Court is to consider the length of time between the crime

1 and the time of the confrontation, I guess you would have
2 to concede that, that would disfavor permitting eyewitness
3 identification?

4 **MR. SLOAN:** Yes, your Honor.

5 **MR. DALY:** Could you your Honor speak into
6 the microphone?

7 **THE COURT:** Yes, I'm sorry.

8 So the Court inquired whether the government
9 agrees that the time between the crime and the
10 confrontation here is -- couldn't get much worse from the
11 standpoint of admissibility.

12 **MR. SLOAN:** Your Honor, the government
13 concedes that this factor weighs against reliability.
14 This was a 12 year time span between the events and the
15 I.D.

16 But again, your Honor, I would point the Court
17 to -- I've already covered the first two factors -- but as
18 to Number 3 and 4, the accuracy of the description and the
19 level of certainty, I believe the report indicates that
20 the witness actually had a pretty specific description of
21 the defendant in terms of complexion relative to the
22 person whom he was fighting, clean cut. He seems to
23 recall specific clothing, but he wasn't sure given the
24 lapse in time.

25 And again, just turning to the fourth factor,

1 level of certainty, the agents indicate in their report
2 that when he turned to Photo 3 in the array, he
3 immediately said that's him, and as the agents are trained
4 to do, they ask further questions to gauge the level of
5 certainty. They document that in their report, and that's
6 certainly fair game for cross examination for counsel at
7 the trial to say, why did you back off of it, but the fact
8 remains his initial identification was immediate that
9 Photo 3 was the suspect.

10 So, your Honor, the government does think if we
11 get to the next step, Step 2, the factors would
12 nevertheless weigh in favor of reliability.

13 **THE COURT:** And if the Court concluded that
14 the identification evidence is inadmissible, you -- that
15 doesn't go as far as Mr. Feinberg was asking the Court to
16 consider denying the witness' testimony, not permitting
17 the witness to testify at all in the case if I understood
18 his argument, and you agree that would be the appropriate
19 remedy?

20 **MR. SLOAN:** Your Honor, I do think if the
21 Court does find there was impermissible suggestiveness,
22 and then the Court makes a further finding under the
23 Biggers factors, the statement was not reliable, then
24 that, the Court's finding, would taint the witness'
25 testimony for in court testimony.

1 **THE COURT:** On any subject?

2 **MR. SLOAN:** Just as to the identification,
3 your Honor, and the pretrial identification photo array.

4 **THE COURT:** All right.

5 **MR. SLOAN:** So I don't think it is really as
6 broad as could not testify to anything, and the government
7 would consider what the scope of that would be, but as to
8 the specific photo array identification of Robert Brown, I
9 think if the Court makes a finding that it was not
10 reliable, that would taint the government attempting to
11 elicit an in court I.D. from that witness, but I can
12 proffer to the Court I don't believe the government would
13 be seeking to do that any way.

14 **THE COURT:** So as it relates to the third
15 factor, you don't really, other than complexion and clean
16 cut, you don't have any prior description of the
17 individual from the --

18 **MR. SLOAN:** Your Honor, if you're asking a
19 specific height or weight, no, we do not.

20 **THE COURT:** Okay.

21 **MR. SLOAN:** Court's indulgence?

22 **THE COURT:** Yep.

23 **MR. SLOAN:** Just a brief point of
24 clarification, I was conferring with one of the agents,
25 Agent Nasser who was present for the interview, what he

1 related to me in terms of height, the witness referred to
2 the other agent present, Agent Horvath, and indicated that
3 the suspect was about the height of that agent, and I
4 believe that agent is a little under 5-10.

5 **THE COURT:** Okay. Mr. Brown is how tall?

6 **MR. FEINBERG:** My client indicates, and my
7 information is he's 6 feet 2 inches.

8 **THE COURT:** Okay.

9 **MR. SLOAN:** So your Honor, that's all the
10 proffer that I can tell you. Agent Nasser is here if the
11 Court wants to hear further about the conduct or the
12 procedure.

13 **THE COURT:** Well, I think that would probably
14 need to occur under oath in a hearing that I don't know if
15 Mr. Feinberg --

16 **MR. FEINBERG:** Well, I would request all the
17 agents that participated in the interview, and the alleged
18 identification, as well as Mr. Gaskin.

19 **THE COURT:** So we have Agent Horvath and we
20 have --

21 **MR. SLOAN:** Agent Nasser.

22 **THE COURT:** The only two?

23 **MR. SLOAN:** Yes, sir.

24 **THE COURT:** And had Nasser been on this
25 investigation from --

1 **MR. SLOAN:** Yes.

2 **THE COURT:** Okay.

3 **MR. SLOAN:** I can get a specific answer if
4 the Court wants, but both agents are involved in the
5 investigation of the gang.

6 **THE COURT:** All right. Well --

7 **MR. FEINBERG:** I think it is also interesting
8 that Agents Horvath and Nasser are in the courtroom, but
9 it certainly concerns me that they were present during my
10 argument, the government's argument and your questioning
11 of the Assistant U.S. Attorney, and they have been court.
12 So they know the areas in which my concerns are, and I
13 think that's improper for them to have been present,
14 understanding I didn't know -- I don't know who they are,
15 and that the government would not have sequestered them.

16 **THE COURT:** Okay.

17 **MR. SLOAN:** Your Honor?

18 **THE COURT:** Yes.

19 **MR. SLOAN:** Well, Agent Horvath is not here.
20 So if the Court has concerns about Agent Nasser having
21 been here for some of the factual proffer, which again,
22 was based on his report, he has not been in the courtroom.

23 **THE COURT:** All right. Thank you.

24 **MR. SLOAN:** Thank you, your Honor.

25 **THE COURT:** If the Court gets to the totality

1 of circumstances analysis, and the consideration of the
2 five factors that are set forth in the Biggers case, the
3 weighing of those factors I think in general would lead
4 the Court to deny the admissibility of the identification
5 testimony. That would not affect testimony from the
6 witness about his observations of the incident, but it
7 sounds as if the accuracy of the witness' prior
8 description of the criminal is -- the criminal defendant
9 in this case -- it's not that it is inaccurate, but it is
10 fairly limited in its value; that the witness' degree of
11 attention we don't really know about from the information
12 submitted so far.

13 The opportunity for the witness to view the
14 criminal at the time of the crime is -- would I think
15 slightly favor the government's claim, but again, all of
16 these factors should be considered by the Court in an
17 evidentiary hearing I think before making a final
18 assessment.

19 The level of certainty demonstrated by the witness
20 at the confrontation I think has been described here, and
21 it is -- and it starts out with a declaration of certainty
22 and ends up with something more equivocal. The length of
23 the time between the crime and the confrontation is, of
24 course, as I indicated, is a difficult factor for the
25 government to overcome in terms of the reliability of the

1 identification testimony.

2 And so at this point I'm unable to rule with
3 finality on the question of identification, but I would
4 have to say that likelihood of its being found by the
5 Court to be permissible is not so great.

6 I will, however, in order to give the government
7 fair opportunity to be heard on the subject, be willing to
8 conduct an evidentiary hearing, which may benefit the
9 Court in further consideration of these factors, or may
10 persuade the Court that there is -- I'm still not certain
11 that the totality of circumstances are only considered if
12 the Court finds that the -- there's reason to believe that
13 the process was impermissibly suggestive, because that
14 showing I think is problematic under the -- what we know
15 so far.

16 So I need to look at that aspect of the
17 government's argument to be certain as well.

18 So I guess you're not getting a final ruling
19 today, and I would leave to the government the opportunity
20 to have an evidentiary hearing if they choose to do that,
21 but I'll give you a chance to talk about that among
22 yourselves.

23 **MR. SLOAN:** Thank you, your Honor.

24 **THE COURT:** Okay. All right. So then the
25 second issue to address is the defendant Shy's motion in

1 limine to preclude Mr. Bailey's video recorded statements,
2 and so I'll hear from Mr. Magidson.

3 **MR. MAGIDSON:** Good morning, your Honor.

4 So over the weekend we did file a motion in limine
5 to preclude co-defendant Bailey's recorded statements, and
6 or to sever him from this trial, and he can have his own
7 trial later on, or join other people, but he should not be
8 part of this case, or the statements themselves should not
9 be included as it relates to Mr. Shy.

10 So just to back up a little bit, on -- we did have
11 an opportunity late -- or one point last week to view the
12 evidence of the -- that the government was intending to
13 introduce in this matter, and I went there. There's a lot
14 of evidence, but not 344A, which was these video clips.

15 Then later on Friday, I guess we were here on
16 motions at some point -- on Thursday -- and it was
17 revealed that there was something going on. We didn't
18 know what because other defense counsel didn't know.
19 Ultimately, it was revealed that there is these video
20 clips, and that ultimately we would receive them later
21 that day or Friday -- I forgot which -- but nevertheless,
22 it took awhile -- a little bit to review these clips, and
23 what we received were six individual clips of purported
24 statements. They vary in length. They are short. Some
25 are a minute, maybe some are 2-3 minutes, but relatively

1 short.

2 But at least in my view, these clips are damaging
3 and hurt Mr. Shy, and in those videos Bailey confirms that
4 the Seven Mile Bloods, you know, is as a matter of fact,
5 an organization. He states that there's about six core
6 group members when you filter it down, not the wannabes or
7 the druggies or anything like that, but when you get right
8 down to it, there's a core of six or seven, and
9 coincidentally that's who's on trial here.

10 The number being tried in Group 2 states that
11 there was a beef or a dispute with Hustle Boys, the Gutta
12 Gang, and things like that. He names individuals who he
13 specifically thinks are enemies and who coincidentally are
14 now dead.

15 So this corroborates in many respects what the
16 government is alleging here, that these are some overt
17 acts, that these are corroborated.

18 Now we have available -- the Court has not seen
19 this obviously -- we have available, if the Court believes
20 that it would be helpful, we can play that for the Court.
21 As I said the six clips might be about eight to 10
22 minutes. So it may be worthwhile for the Court to view
23 that. So you will have to take my word for it.

24 **THE COURT:** I have actually seen the clips
25 that are at issue.

1 **MR. MAGIDSON:** Okay. So then --

2 **THE COURT:** I heard all the pertinent clips.

3 **MR. MAGIDSON:** Okay. So then as long as you
4 seen and heard that, then there's no need to rehash that.

5 So basically what we're suggesting here is that
6 this statement is not a statement made by a co-conspirator
7 or in furtherance of the conspiracy; that is, it is not an
8 exception under 801(d)(2)(E).

9 To show that it was such a statement, the
10 government has to show, number one, that the conspiracy
11 existed, the defendant was a member of the conspiracy, and
12 that the co-conspirator statements were made in
13 furtherance, but here at the time of the statement -- when
14 the statements were made, they were made not in
15 furtherance of the conspiracy, but they were made as some
16 sort of proffer to the government while he was in custody,
17 and so a person's role in the conspiracy ends with his
18 arrest, and we've cited case law to that effect.

19 Now so what we're left with then are statements
20 made by a co-defendant, a co-conspirator that's not in
21 furtherance, but yet, we have no ability to cross examine
22 that statement, and so then we have to look to Crawford v
23 Washington, and the cases cited there that provides that
24 the admission of testimonial hearsay against the defendant
25 is prohibited unless the declarant is unable to testify at

1 trial, and the defendant had a prior opportunity to cross
2 examine him, and so we have no opportunity to cross
3 examine him. He is unavailable at trial because we do not
4 anticipate him testifying.

5 Further, we cited Bruton as well, which the Court
6 is familiar with. In Bruton, we have a co-defendant whose
7 statement is being offered. It implicates the defendant.
8 That can't -- that can't come in.

9 Now there's been some suggestion that a curvative
10 jury instruction only with regard against Mr. Bailey would
11 suffice. We're saying that's not right. It's not -- we
12 can't use that. It's our position that even when the jury
13 is instructed to consider the confession only against the
14 defendant, the court in Bruton determined that the danger
15 of misuse of the confession by the jury is too great to be
16 constitutionally permissible, and we cited that as well.

17 Mr. Bailey's out of court statements support the
18 allegations that there was an organization. It had
19 structure and purpose. He talks about shootings of named
20 victims in the indictment. He talks about the core group
21 of Seven Mile Bloods. He talks about the fact that
22 they're having -- this gang is having beefs with other
23 gangs, and named names, and those people are actually
24 victims in this case, and finally, because he was in
25 custody, these were not made in furtherance.

1 So we believe that the admission of Bailey's
2 statements violates the holdings in Crawford and Bruton.
3 There is no prior opportunity to cross examine, and we
4 also believe that Bruton is instructive. Regardless of
5 what instructions the jury might be receiving, it's going
6 to cause confusion. It's going to cause problems, and I
7 think the only remedy as I've outlined here is number one,
8 it cannot be used against Mr. Shy in this case, and that
9 the proper remedy then is to either prohibit them, or if
10 the government -- nor if the Court is not so inclined,
11 then Mr. Bailey has to be severed from this group because
12 otherwise the -- those statements are going to be used
13 against Mr. Shy in a way that would be improper, and we
14 have no ability to cross examine Mr. Bailey on this.

15 **THE COURT:** All right. I guess I'll hear
16 from the other defendants.

17 **MR. H. SCHARG:** Henry Scharg on behalf of
18 Eugene Fisher.

19 This information was disclosed to me. I filed a
20 submission letter with the Court raising my objections.
21 When Mr. Shy's attorney filed the motion in limine, I
22 joined in on that, and I appreciate the opportunity to --
23 to add to the arguments of Mr. Shy's counsel.

24 **THE COURT:** For purposes of your argument, we
25 can assume that the testimony is -- clearly it is

1 testimony, and the question ultimately for co-defendants
2 is coming down to whether they are ineluctably, whether
3 inescapable, that somehow the co-defendants individually
4 have been --

5 **MR. H. SCHARG:** Prejudiced? Judge, this
6 statement was made in 2014. This statement has been
7 hanging out there for four years. The first time we find
8 about this -- Mr. Fisher and I find out about this is last
9 Friday. It's important --

10 **THE COURT:** When you say find out about this,
11 you mean find out about the government's intention to use
12 the testimony?

13 **MR. H. SCHARG:** No, we didn't even know about
14 the statement. We didn't even know about the interview
15 until last Friday. This is a pattern of trial by ambush,
16 and I would say if this was an isolated incident, it could
17 be -- it wouldn't be excusable, but it could be more
18 understanding.

19 What we have is a pattern in terms of Mr. Brown
20 with the surfacing of this identification 12 years later,
21 the dumping of Facebook materials right before the trial,
22 and then this last move by the government believing
23 that -- they are going unchecked in their power and their
24 position in this case.

25 The problem is if we look at -- I would like to

1 play this because it has the impact, Clip Number 2,
2 whereas during this interview -- and I can't talk about
3 the interview because we still don't have this three hour
4 proffer by Mr. Bailey. All we were able to -- when I say
5 "we", Mr. Fisher and what I have been able to obtain are
6 these seven snippets. The government and Mr. Bailey's
7 counsel have denied the request for us to -- for
8 Mr. Fisher and I to see the entire three hour interview.
9 So I can only speak from the seven snippets, but the
10 second snippet is the most damaging and prejudicial.

11 Please play it, Mr. Anton.

12
13 (Video clip played.)
14

15 **MR. H. SCHARG:** So the evidence is that the
16 government is preparing -- or requesting to present to
17 this jury by a co-defendant who acknowledges that he was a
18 member of the Seven Mile Bloods, was that there is a
19 number of peons, but the core is seven or five members.

20 This jury is going to be watching that and looking
21 at that table, and what do they see? They see five to
22 seven defendants that are alleged to be members of the
23 core group of the Seven Mile Bloods, and I have to sit
24 there and cannot defend my client in terms of any type of
25 cross examination of that statement.

1 And furthermore, I don't even know what else is in
2 that interview. I don't know whether if during that three
3 hours plus, whether my client was ever mentioned as being
4 one of those cores, being one of the peons, whatever.

5 What I do know was that by the government sitting
6 back on this until Friday, trying this case by ambush,
7 that when this jury panel was seated, when we going
8 through the jury voir dire process, that my opportunity to
9 question the jury panel as to whether they could be fair
10 and objective, and whether they would have any bias
11 regarding this type of evidence, that ship has sailed.

12 So there has been an impact and a prejudice to my
13 client because we were not informed of this exhibit that
14 has been known to the government for four years, that they
15 sat on it for four years, and surfaces it intentionally
16 and by designed after the jury selection process.

17 I know what I think. I know what my client
18 thinks. I probably know what this jury will think when
19 they hear -- if they hear that clip, and you don't have to
20 be an accountant or a rocket scientist to count up to
21 five, six or seven, and during that we just sit there, and
22 we continue to sit there, and we don't get a chance to
23 challenge that in any way.

24 The government in their brief says, the Court is
25 not required to do so unless the evidence will cause

1 compelling specific and actual prejudice. If that's not
2 actual prejudice, then I haven't seen it in the courtroom.
3 The fact is that my client is and will be prejudiced by
4 that snippet indicting him for being one of five, six or
5 seven core members of the Seven Mile Bloods, when the
6 government knows that he is not even a member of the Seven
7 Mile Bloods.

8 **THE COURT:** Tell me how, Mr. Scharg, that
9 this sets forth ineluctably an identification of your
10 client as a member when they are going to hear the names
11 of probably all 22 defendants at one point or another
12 during the course of the trial, and why would they be led
13 inescapably to the conclusion that your client is one of
14 the members when there are 22 others to choose from?

15 **MR. H. SCHARG:** Well, first of all, there
16 were 22 that were indicted.

17 **THE COURT:** They were speculating. So of
18 course, they would be instructed that they may not -- that
19 they are -- it is evidence for limited purposes to be
20 considered only for that limited purpose, and multiple
21 other instructions; that if they listen to the
22 instructions and follow the instructions, it would
23 preclude any inescapable conclusions that your client is a
24 member of the SMB.

25 **MR. H. SCHARG:** First of all, not only is

1 there 22 indicted individuals related to the Seven Mile
2 Bloods, but there were a number of other individuals that
3 were members of SMB, who associated with SMB, and have
4 about been buried as former members of SMB.

5 The problem is is the optics, Judge. We could
6 assume that the jury will follow the law, but what we do
7 is we have these optics. We have these optics that the
8 jury is going to hear about six or seven core members, and
9 there's six defendants and Billy Arnold, which makes seven
10 at this table, and the reason we're at this point is
11 because the government sat back. They hid in the woods.
12 They are conducting trial by ambush, because if they would
13 have disclosed this to us sometimes during the last four
14 years, when we picked a jury, this was probably numero uno
15 in terms of the areas we would have explored to see if
16 whether it would have any impact on the jury.

17 So instead of assuming that the Court -- that the
18 jury will follow the Court's instructions, we could have
19 had -- actually had a dialogue and questioned the jurors
20 like on other issues as to whether it would have any
21 impact upon them, and that's the whole purpose of the
22 government coming forward with this type of information
23 and evidence and exhibits, so that we can question the
24 jury in advance, and they shouldn't be rewarded for this
25 for laying back and holding back, this sitting back and

1 disclosing that after we pick the jury.

2 The horse has left the barn. There's no way now
3 to question this jury as to any impact that would have,
4 and I suggest to the Court I don't think it should be
5 minimized that this jury is going to disregard the optic
6 of a co-defendant in this case sitting at the table with
7 this jury watching him, watching the screen, and watching
8 the defendants at this table, and this could have been
9 avoidable. This could have been avoidable if four years
10 after the fact, but prior to the jury selection this could
11 have been disclosed to Mr. Fisher and myself.

12 I believe that the Court has two choices, you can
13 either deny the government's -- deny the government the
14 opportunity to show these clips, or sever Mr. Bailey from
15 this trial. Thank you.

16 **THE COURT:** Thanks.

17 **MR. FEINBERG:** On behalf of Mr. Brown, we
18 would were able to file an inclusion to the motion, but we
19 do ask to be included in the motion, and adopt Mr.
20 Magidson's and Mr. Scharg's argument.

21 **THE COURT:** All right. Thank you.

22 **MR. JOHNSON:** Same for Devon Patterson,
23 Judge.

24 **THE COURT:** Okay. Thank you, Mr. Johnson.

25 **MR. S. SCHARG:** Your Honor, Steven Scharg on

1 behalf of Mr. Porter. I filed notice of joinder with Mr.
2 Shy's attorney on this issue, and we feel it would be
3 prejudicial to allow -- for the statement to be allowed.

4 **THE COURT:** All right. Thank you, sir.

5 Okay. From the government, Ms. Smith?

6 **MS. SMITH:** Thank you, your Honor.

7 Rule 16, as you know, does not require our
8 disclosure of co-defendant statements to other defendants
9 in this trial group, but if Mr. Scharg had checked his
10 discovery, he would have seen on May 31st, three weeks
11 before -- or weeks before he started picking a jury, a 302
12 was disclosed to him that detailed the interview between
13 Bailey and law enforcement. The 302 corresponds with the
14 video, one of the clips that you saw this morning.

15 And so he had the information in his possession
16 when we picked the jury, and I was not here for jury
17 selection, but I'm confident that these defense attorneys
18 took the time to voir dire potential jurors on their
19 ability to parse out evidence specific to their client, as
20 well as specific to other clients.

21 And so I think that issue, to the extent that he
22 complains that he didn't have an opportunity, I'm sure he
23 did take an opportunity in a general sense, but he also
24 had that specific interview in his possession by the time
25 the jury selection started.

1 So I'll cut to the chase. There's three issues
2 here, the Crawford issue, the Bruton issue and the
3 severance issue, and as we noted, we don't intend on
4 introducing defendant Bailey's against anybody except for
5 defendant Bailey, and because of that, Crawford is not an
6 issue. It's not implicated, and we don't need to continue
7 on in the discussion.

8 If we were seeking to introduce those statements
9 as against the other defendants, then we would have
10 another problem, but we don't because we're not going to.

11 So that brings us to the next issue, which is even
12 where the defendant admits to being part of a group, as
13 what happened here, and even if those statements could be
14 helpful for us to prove a conspiracy against the remaining
15 defendants, there's still no Crawford issue, and I noted
16 cases in my brief that included specific RICO cases, and
17 that is Vasilakos, V-a-s-i-l-a-k-o-s, the Driver case, the
18 Espinoza case and the Norwood case, N-o-r-w-o-o-d, and I
19 call the Court's attention to the Norwood case because
20 that -- those facts are similarly aligned with the facts
21 that are occurring here. So we have no Crawford issue.

22 The next question is do we have a Bruton problem?
23 We only have a Bruton problem if defendant Bailey's
24 statements implicate one of the other individual
25 defendants at the table, and that's not the case here.

1 The defendant does not name any particular individuals in
2 those clips, no nicknames, no characteristics, and no
3 specific identifiers that would implicate unfairly any of
4 these defendants sitting at the table.

5 Now Mr. Scharg made reference to the fact that the
6 defendant said -- talked about this core group of Seven
7 Mile Bloods being somewhere between five and seven, and I
8 would note as the Court has recognized, the Seven Mile
9 Bloods consisted of more than five to seven people, and in
10 fact, as the case progresses, we're not even alleging that
11 defendants Fisher or Porter were part of that core group.

12 We are alleging an enterprise of which all of
13 these defendants were a part of, but not just them. There
14 are 22 individuals on the indictment, and there will be
15 dozens of names that will come up as alleged SMB members
16 during the trial.

17 So even that statement doesn't even come close to
18 being a Bruton problem, and again the cases that we cited
19 in our brief support that.

20 So because there's no Crawford issue and because
21 there's no Bruton issue, there's no basis for severance
22 here. I don't think that there's a basis for individual
23 defendants to kick a different defendant out of a trial
24 group. I think they can only ask for their own severance,
25 but nevertheless, the Vasilakos case talks about the

1 limiting instructions that are appropriate in cases like
2 this. The jury is presumed to understand what they are
3 being instructed heeds to do, and they are presumed to
4 follow those instructions, and there's been no indication
5 that this jury is any different than any other juries.

6 So your Honor, for all of those reasons, the
7 defendants' motion should be denied.

8 **THE COURT:** Thank you, Ms. Smith.

9 **MR. H. SCHARG:** One point, your Honor.

10 **THE COURT:** Yes.

11 **MR. H. SCHARG:** And I'm trying to look at it
12 right now to verify any recollection. We received the
13 exhibit list after it was due, but the original witness
14 list we received was on May 31, 2018.

15 My recollection and the recollection of others at
16 the table was that that exhibit regarding the 302
17 narrative was not on that witness list. It was on the
18 supplemental witness list that we received last Wednesday,
19 June 12th, after the jury selection, and unless the
20 government can prove me wrong, and they have the original
21 witness list, and they point to the fact that that was
22 disclosed before jury selection, I welcome them to correct
23 me, and to support their allegations, which I think are
24 false.

25 **MS. SMITH:** Your Honor, he's correct about

1 the witness list. What he's incorrect about is he
2 received a copy of the 302, which was the report
3 indicating that this defendant had been interviewed by law
4 enforcement. He had that information on May 31st. We are
5 not required to select and give them copies of every
6 single exhibit that we intend to use at trial a month
7 before the jury is selected. He had the information in
8 his hand.

9 **MR. H. SCHARG:** We didn't have the exhibit
10 list. On the original exhibit list that she referred to
11 on May 31st, we did not have the exhibit regarding
12 Mr. Bailey's 302 or any reference to the videos. So for
13 her to make that argument to the Court that we had before
14 the jury selection is blatantly false. We did not receive
15 that until last week after the jury was selected.

16 So that argument -- that argument, that narrative,
17 is false, and that is the most important --

18 **THE COURT:** I'm trying to understand. You
19 do -- you dispute that you got the 302 which describes the
20 statement?

21 **MR. H. SCHARG:** On the exhibit list of May
22 31th.

23 **MR. SPIELFOGEL:** Not only the exhibit list, a
24 witness list. There's a witness list that was given, and
25 after that there was an exhibit list, and on the first

1 exhibit list that we got, it wasn't -- there was not
2 anything about Corey Bailey clips, and it wasn't until
3 after they met with the government -- and I was not able
4 to be at that because I was not here -- that's when it
5 came out, and I believe that was after the jury --

6 **MR. H. SCHARG:** June 12th.

7 **MR. SPIELFOGEL:** June the 12th. So when you
8 get an exhibit list, even if you got 302's and they say
9 they are not going to use it, what is there to talk about?
10 It isn't until after the jury is picked on June 12th.
11 That's when it was first listed.

12 **MS. SMITH:** Your Honor, defense counsel's
13 argument was that he couldn't properly voir dire the jury
14 panel because he didn't know of this interview's
15 existence. He knew of the interview's existence. That we
16 had not selected particular clips is of no moment. His
17 argument that he did not know this interview existed is
18 belied by the fact that he received a 302 on May 31st.

19 **MR. SPIELFOGEL:** Why would you get up and
20 question jurors about something that isn't on an exhibit
21 list that you don't think is going to be introduced at
22 trial? It would be ridiculous. You may hear testimony
23 about a clip from one of the defendants when it's not even
24 on a list. They don't even know that there is clips.

25 **THE COURT:** All right. Well --

1 **MR. MAGIDSON:** Judge?

2 **THE COURT:** Mr. Magidson?

3 **MR. MAGIDSON:** So to say this evidence is not
4 going to be used against Mr. Shy is ludicrous. The fact
5 is it is, and so --

6 **THE COURT:** How so, Mr. Magidson?

7 **MR. MAGIDSON:** Well, okay. So first of all,
8 let's go to what we were talking about, this core group.
9 What I would want to be asking Mr. Bailey, sir, are you
10 referring to Mr. Shy? Is he in the core group? What
11 makes him a core group just because you say so?

12 I'm going to be hammering him on those issues, and
13 I'm going to be hammering him on the other issues about --
14 he talks about -- he defines the Red Zone. He talks about
15 the real zone. He defines the fact that 48205 is not the
16 Red Zone because that's a broader area. He goes into very
17 specifics. He goes into much more detail defining this.

18 That's going to be used against Mr. Shy because
19 it's alleged a RICO conspiracy, and this is proving those
20 elements, and so if I can't attack the witness who's
21 making these statements against my client, then we suffer
22 prejudice, and that prejudice was recognized in Bruton,
23 your Honor. It talks about the introduction of evidence
24 confession. Whether you call it a confession or whether
25 you call it whatever you call it, it's being used against

1 my client. Otherwise, the government would not be
2 introducing this.

3 What the Court in Bruton said this poses a
4 substantial threat of the right to confront witnesses
5 against him, and this is a hazard that we cannot ignore.
6 Despite the concededly clear instructions to the jury to
7 disregard evidence of inadmissible hearsay evidence
8 inculcating petitioner in this context of a joint trial,
9 we cannot accept limiting instructions as an adequate
10 substitute for the petitioner's Constitutional Right of
11 cross examination. The affect is the same as if there had
12 been no instruction at all.

13 So the government says, you know, we can give
14 these cautionary instructions, but that -- once that bell
15 rings, that bell keeps ringing, and the jury is going to
16 hear this, and it's totally unfair.

17 Now the fact is that I can't cross examine an
18 empty chair, and this is -- as counsel said, we're just
19 going to have to sit there and take it, punch after punch
20 without punching back. That's unfair.

21 **THE COURT:** All right. Thank you, Mr.
22 Magidson.

23 The Court basically tracks the argument on this
24 question to come down to the ultimate issue of whether
25 the -- whether there's a Bruton problem, because the

1 testimony will inescapably result in the jurors
2 identifying the co-defendants in this case as members of
3 the SMB when the names aren't mentioned, when there's
4 virtually nothing more than the argument, which I
5 acknowledge have some force in this case made by the
6 defendants that there are six of them sitting here who
7 could be -- the jury could speculate were members of the
8 SMB.

9 Well, indeed, as it relates to each of the
10 defendants, there's going to be plenty of evidence
11 introduce to address that issue, and nothing that from
12 Mr. Bailey's testimony would lead inescapably to the
13 conclusion that the other co-defendants were members, and
14 that's the standards under Bruton.

15 There's not a Crawford issue for the same issues
16 that were argued here, and there's not a Bruton issue.
17 It's just as simple as that.

18 And as it relates to the late notice of the
19 interview and the clips that are going to be used by the
20 defendants in the interview, there's a lot that's gone on
21 late in this case, not all attributable to the
22 prosecution. Indeed, the unexpected resignation of Mr.
23 Graveline has led to a lot more in the way of scrambling
24 on the part of plaintiff's counsel to be ready for this
25 trial. There were multiple reasons to consider delaying

1 the onset of the trial. Understandably, the defendants in
2 this case wanted to have their trial. They did not want
3 to have any delays that might have addressed questions
4 like this along the way, but everybody committed to the
5 process on both sides, and I don't find any wrongdoing on
6 the part of plaintiff's counsel in the identification of
7 this evidence, and the designation of it for presentation
8 during the trial.

9 And as to limiting instructions, I don't -- the
10 jurors were questioned at great length about their ability
11 to follow the Court's instructions on the law, and that
12 was the subject of a lot of the questioning by defense
13 counsel as well as the Court, and I think the -- there's
14 no reason to believe that a jury could not fairly judge
15 the culpability on an individualized basis in this case,
16 and there's nothing more than that is at stake here than
17 the general reasons that the Court groups defendants
18 together for trial, which has nothing to do, again, with
19 the clips as the Court has read the transcripts of those
20 clips in connection with those motion.

21 So the Court is going to deny the motion.

22 **MR. H. SCHARG:** Judge, you know, Mr.
23 Graveline's abrupt departure from the government team two
24 weeks before trial should not be an excuse for the
25 government, and they have no explanation as to why they

1 waited four years to disclose the fact that they were
2 going to present this evidence at trial, knowing that this
3 is a matter that should have been resolved prior to the
4 commencement of this trial, and they have given no
5 rational explanation as to what happened in the last two
6 weeks which would cause them to make this monumental
7 change in their strategy to bring this forth after the
8 jury selection process.

9 Saying that, the other issue here is will the
10 Court allow us -- me and my client to have access to that
11 complete three hour video, because there is a possibility
12 that there may be something favorable to me, that although
13 I cannot question Mr. Bailey, I can question the agents
14 who conducted the interview, and it is premature to
15 resolve those issues, and it would have to be done at a
16 later time.

17 But I think it is fundamentally unfair for the
18 government to present these snippets, which is about eight
19 minutes of a three hour interview, where a co-defendant is
20 offering cooperation with the government, and that I don't
21 have the opportunity to see that three hour tape. The
22 government has denied that request. Mr. Bailey's
23 attorneys, rightfully so though, have denied us that
24 access. So I have to rely on the Court to order the
25 government to provide me with that interview. I can't see

1 of any other alternative, and I believe at this time since
2 that horse is out of the barn, we have a right to see the
3 entire interview, and not rely on these snippets which
4 don't put the exhibits in its proper context.

5 **THE COURT:** Okay. Thank you, Mr. Scharg.

6 **MR. FEINBERG:** Judge, I have another issue
7 that I would like to address the Court.

8 **THE COURT:** On some other issue?

9 **MR. FEINBERG:** A similar issue, your Honor.

10 This Court in its decision indicated that you
11 would ask the defense attorneys and the defendants whether
12 or not they wanted to prolong the trial -- the beginning
13 of the trial as a result of the government's problem with
14 Mr. Graveline retiring. We all indicated no.

15 However, we, as defense attorneys, advising our
16 clients to indicate we need additional time in order to
17 review discovery that we don't know exists, meaning
18 Mr. Bailey's statement. Had we known, maybe when you
19 asked the defense attorneys and the defendants whether or
20 not they wanted to prolong the beginning of the trial, had
21 we known the existence of the interview, and had an
22 opportunity to review the entire interview, not just the
23 snippets, maybe there would have been something different,
24 but how were we suppose to constitutionally represent our
25 clients in good faith, and say we want the trial to start

1 instantaneous when we don't know that something that is
2 very, very crucial and potentially very, very harmful even
3 existed.

4 So I ask the Court to reconsider its ruling based
5 on the fact that the government didn't indicate, oh, by
6 the way, your Honor. We have some information that we are
7 going provide after the jury is selected that may cause
8 them some concern.

9 **THE COURT:** All right. Well, for the
10 government Mr. Bilkovic?

11 **MR. BILKOVIC:** Your Honor, just briefly.
12 Mark Bilkovic for the United States. I just want to
13 respond to Mr. Scharg's request because that's something
14 that I have been tasked with handling.

15 The Court has the entire interview. I would ask
16 that if the Court is going to consider Mr. Scharg's
17 request, the Court review that interview in its entirety,
18 and the Court make an in camera determination whether or
19 not that interview needs to be turned over.

20 I don't see any possible way it would be
21 admissible. It's not being used against their clients.
22 They can't bring in portions of it because it is not
23 statements of their client. It's' not -- it's basically
24 an admission against Mr. Bailey which allows us to bring
25 it in. It doesn't allow them to bring it in.

1 So I would ask the Court to consider watching the
2 entire video, and then make a determination as to whether
3 the Court feels the need to have us turn it over.

4 With respect to Mr. Feinberg, it's the same thing,
5 Judge. We're not arguing -- we're not admitting this
6 against his client, and again, all of the defendants, they
7 didn't have the clips, all of the defendants, all of their
8 attorneys had the 302 on May 31st before we picked a jury.
9 They had a witness list where one of the officers that
10 took the interview was present on the witness list. So
11 even if we didn't have the clips, nothing would have
12 stopped us from calling the witness that interviewed
13 Mr. Bailey, and tendering portions of his statement to
14 this jury, and the defendants were all aware of that prior
15 to picking a jury.

16 **THE COURT:** All right. Well, I'm persuaded
17 that the snippets will be allowed as evidence. I'll look
18 at the three and a half hours of video that represent the
19 entire interview. The balance has or has not been
20 transcribed?

21 **MR. BILKOVIC:** It has not, your Honor.

22 **THE COURT:** And I'll look at it with an eye
23 on what has been suggested as the value of the interview
24 from the defendant's perspective, and I can rule -- I can
25 set forth in an order the denial of the motion in limine,

1 and will go from there in terms of whether the plaintiffs
2 will be required to disclose the entire three and a half
3 hours.

4 **MR. H. SCHARG:** How can I argue what I don't
5 know? How can they be allowed to cherrypick evidence and
6 just provide to us what they want, what the government
7 wants us to see?

8 If the Court will not release the three and a half
9 hour video interview of Mr. Bailey, at least at a minimum
10 I should have the opportunity to view that in its
11 entirety; that is, if the Court wants to make that
12 compromise, I have no objection to it if it doesn't want,
13 for whatever reason, doesn't want to disseminate the
14 entire interview, but at a minimum, I should be entitled
15 to at least view it in the government's office, in the
16 Court's chambers, but have the opportunity to see that
17 interview in which parts of it are used as exhibits in
18 this trial and have some consequences -- has some
19 consequences against my client.

20 **THE COURT:** All right. I'll render an
21 opinion again on that issue, not recognizing that it
22 wasn't issue before I sat down here this morning. So I'll
23 take a look at the general argument, and decide whether
24 the entire three and a half hours should be released.

25 Anything else that we need to address before

1 tomorrow?

2 **MS. SMITH:** Not from the United States.

3 **MR. FEINBERG:** The question that I have is
4 will we know before opening statement whether -- whether
5 or not the government will conduct an evidentiary hearing
6 on the photo I.D., and whether that will be before we make
7 our oral -- my opening statement so that I can know what
8 evidence I can or cannot discuss with the jury?

9 **THE COURT:** Yes, I think we should get an
10 answer to that question.

11 **MS. SMITH:** Well, your Honor, we've been here
12 all morning. So we have not had a chance to talk, but we
13 don't intend to use that in opening statement, if that
14 helps, but we'll expeditiously discuss what our options
15 are at this point.

16 **MR. FEINBERG:** I'm not concerned whether or
17 not they are going to use it in their opening. I'm
18 concerned whether I can address it, pro or con. I mean,
19 if they're not going to agree to the evidentiary hearing
20 and follow the Court's initial response that it was going
21 to deny the testimony of the photo -- the identification
22 of the photo lineup, that's one thing. If, in fact, at
23 some point in time they are going to say yes, we want to
24 do the evidentiary hearing, that has to be done before I
25 give my opening.

1 **MS. SMITH:** Your Honor, if I may, it looks
2 like we are going to request that evidentiary hearing. So
3 with that in mind, I don't know when the Court wants to
4 hold it.

5 **THE COURT:** Well, if your witnesses are
6 available this afternoon --

7 **MS. SMITH:** We're looking for one of the
8 witnesses as we speak.

9 The agents I think are available. I will call the
10 Court when we find out the location of that witness.

11 **THE COURT:** All right. Let's tentatively
12 plan to conduct that hearing this afternoon at --

13 **MS. SMITH:** We can certainly start with the
14 agents. In the interest of time, we can start with the
15 agents. I don't know how long it's going to take to find
16 the civilian witness, but it can't be -- well, I don't
17 know. If the Court wants to schedule it this afternoon,
18 we have the agents ready.

19 **THE COURT:** I will have to figure out whether
20 I can do that this afternoon or not. So we'll let you
21 know before noon. Do we have your cell phone?

22 **MR. FEINBERG:** I will give you my cell phone
23 number.

24 **DEFENDANT BAILEY:** Excuse me. May I say
25 something? Your Honor, Judge Steeh, y'all said it is not

1 crime to be a Seven Mile Blood, correct? Clearly that's
2 what we're being charged with, being a Seven Mile Blood.
3 Okay. I'm that. So what? I'm from the Red Zone. So
4 what? That's not an enterprise. So these snippets they
5 using to charge again, saying enterprise because I'm the
6 leader of the Seven Mile Bloods gang, that ain't got
7 nothing to do with what's going on with these charges of
8 RICO conspiracy. First trial proved that it's not RICO
9 conspiracy. We ain't no enterprise. They still want to
10 insist that use the admissibility and bring me against my
11 co-defendants, and I never even mentioned them because he
12 not no Seven Mile Blood, he not no Seven Mile Blood, but
13 at the same time, the jury is going take us to Seven Mile
14 Bloods. I'm okay being a Seven Mile Blood because that's
15 not a crime, but still y'all still charging me with being
16 Seven Mile Bloods.

17 No, you know I didn't kill Djuan Page. The
18 evidence shows that at trial in the first trial. Still
19 y'all trying to frame me and make me be guilty of killing
20 Djuan Page.

21 This Court been bias the whole time period. I got
22 acquitted of a homicide in the state. It's okay for them
23 to bring that up, but it's not okay for the jury to know
24 that I was acquitted, like come on. My brother got
25 acquitted of a fabricated RICO case, but it's not okay for

1 him to be on record to the jury that he was acquitted of
2 it. If one individual was acquitted of it, of conspiracy
3 RICO, we all would have been acquitted of the RICO
4 conspiracy, and you seen this. They know this case. It's
5 not what it is. If y'all want to pursue me in trial, come
6 on. I'm ready.

7 **THE COURT:** Okay. We'll continue.

8
9 (Proceedings concluded.)

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C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/Ronald A. DiBartolomeo
Ronald A. DiBartolomeo, CSR
Official Court Reporter

May 9, 2019
Date

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